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No. 87-1954

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

THE CONSOLIDATED CITY OF JACKSONVILLE,
DUVAL COUNTY, FLORIDA,
A MUNICIPAL CORPORATION,

Petitioner,

v.

WINSTON F. NASH,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

As the opinion by the Eleventh Circuit does not conflict with any opinion of this Court, or with any opinion of another circuit court, the Petition for Writ of Certiorari should be denied. The Eleventh Circuit correctly decided for Nash, based on at least six substantial legal findings. Further, the City of Jacksonville failed to provide any evidence that it had administered a valid examination thus, did not refute Respondents Prima Facie case.

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ARGUMENT

I. THE ELEVENTH CIRCUIT COURT'S OPINION DOES NOT RAISE A CONFLICT CONCERNING THE BURDEN OF PRODUCTION STANDARDS SET FORTH BY THE THIRD CIRCUIT.

The city failed to produce any evidence that the 1981 promotional examination for fire lieutenant combat was job related, or content valid. Further, the city in fact succeeded in keeping the examination questions from the trial proceedings. The city's examination construction methods did not meet any of the standards set by 29 C.F.R. 1607, which outlines the steps that should be taken. Instead, the Petitioner used an in house, make-up-as-you-go system that was totally discriminatory. Then, attempted to name the proceess after accepted standards.

No conflict exists between the opinion reached by the Eleventh Circuit and the opinion of the Third Circuit. These cases are of different facts and standards of law,

which show no resemblance, and represent no conflict. The only conflict is contained in Petitioners misinterpretation of case law.

The City refused to allow the examination questions to be admitted as evidence, then attempted to rely on that lack of evidence as a defense. Further, the Petitioner repeatedly argues that Nash admits the examination was job related. No such statement is on record. What's more, no fire fighting personnel are qualified to determine job relatedness of any examination. That is for experts to establish. The City's expert testified that he could not determine the job-relatedness of the 1981 examination. The City's own personnel examiner also testified at trial that they did not attempt to test applicants on supervisory knowledge skills, or abilities. Thus, the examination made no sense. The only difference between Nash's job assignment and that of lieutenant is the additional supervisory duties assigned to lieutenant. The promotional process in this case was fatally flawed from the beginning.

The Petitioner has attempted to manufacture a conflict where none exist.

II. THE ELEVENTH CIRCUIT OPINION DID NOT VIOLATE THE CLEARLY ERRONEOUS STANDARD, BY ITS FINDINGS REGARDING JOB RELATEDNESS.

The Eleventh Circuit correctly found in its review of the case that no evidence existed as a fact in the record to show that the examination was job related according to the minimum standards of 29 C.F.R. 1607. It is very clear that the city's solitary explanation of how it composed the examination was not legally sufficient to refute

Respondent's Prima Facie evidence presented in the case. The City's expert witness testified at trial that he did not test the aspect of the examination that correlated job performance with test scores. Thus, a conclusion that the examination was job related was clearly erroneous. The Eleventh Circuit was correct in its findings that the Trial Court decision was clearly erroneous.

III. THE ELEVENTH CIRCUIT DID NOT ERR IN ITS DECISION ON THE ISSUE OF EVIDENCE THAT IT CONSIDERED.

The City placed itself in a position outside of accepted standards for examinations outlined in 29 C.F.R. 1607, then refuse to submit the examination as evidence, alleging possible breach of secrecy two years after the examination was given. Further, the city in practically the same breath, testifies how it composes new examinations each time vacancies occur thus, discrediting its secrecy claim. This contradiction further demonstrates the nature of the City's conduct, violating the law on one hand, then turning all of its legal resources against the Respondent in defense of these violations on the other.

IV. THE ELEVENTH CIRCUIT WAS WARRANTED IN ITS RULING CONCERNING THE REMEDY IN THIS CASE.

Evidence was submitted at trial that Nash had served as lieutenant numerous times as required by rules and regulation of the Jacksonville Fire Department, and was monetarily compensated for those assignments. Nash passed the examination in 1976, with a final score of 84. Further, evidence was given that Respondent has earned, a Master's degree in Management and Supervision, a Bachelor's degree in Business Administration and an As-

sociate Arts degree in Fire Science. All of which exceeds the credentials of the highest ranking officials in the Fire Department. At trial, testimony was given that the top ranking supervisors are appointed without any examination what-so-ever.

Petitioner argues that the Trial Court should be afforded an opportunity to balance equities. Respondent simple states that the Trial Court had several opportunities to balance equities. According to the Eleventh Circuit, the Trial Court did not balance equities according to standards of law.

The City of Jacksonville is asking that it be excused from its burden as an employer and litigant. When historically, the record shows that fairness and compliance with law is lacking in administration of the City's promotional process.

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CONCLUSION

As the Eleventh Circuit properly recognized, relief was due in this case to Respondent based on at least six important legal issues which are included in its opinion. This Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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